PATRICK BLUMM ET AL.

IBLA 95-336, 95-487, 95-488, 98-117, and 98-118 — Decided February 24, 1998

Appeals from five Decisions of the Acting Area Manager, Taos Resource Area, New Mexico, Bureau of Land Management, offering to issue special recreation use permits for commercial river boating use and penalizing one permit, and from two Decisions of the District Manager, Albuquerque District, New Mexico, Bureau of Land Management, denying protests to proposed issuance of permits. NM-81507, et al.

Appeals IBLA 95-487 and 95-488 dismissed; Decisions in IBLA 98-117 and 98-118 affirmed; Decisions in IBLA 95-336 affirmed in part, reversed in part, and set aside in part.

1. Rules of Practice: Appeals: Dismissal--Rules of Practice: Appeals: Statement of Reasons

   The Board will dismiss an appeal when the appellant fails to submit a statement of reasons which affirmatively points out in what respect the decision appealed from is in error, as required by 43 C.F.R. § 4.412(a), and no extension of time has been sought or any explanation for the failure provided.

2. Federal Land Policy and Management Act of 1976: Permits--Special Use Permits

   The BLM properly mandates, as a condition of issuance of a special recreation use permit, that the applicant obtain workers' compensation insurance covering his employees and contractors, when required to do so by state law.

3. Federal Land Policy and Management Act of 1976: Permits--Special Use Permits

   A BLM decision imposing penalties on a permittee for interference with another lawful user of the river will be reversed when the record establishes that emergency circumstances justified the interference.

APPEARANCES: Patrick Blumm, Jack O'Neil, Preston Cox, Steve Miller, and Kathy Miller for Appellants; Arthur Arguedas, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Patrick G. Blumm, owner of Rio Grande Rapid Transit and Desert Voyagers (IBLA 95-336), Jack O'Neil, owner of Wolf Whitewater (IBLA 95-487), and Preston Cox, owner of Embudo Station (IBLA 95-488), all outfitters who use sections of the Rio Grande River in northern New Mexico for commercial boating use, have appealed from five March 8, 1995, Decisions of the Acting Area Manager, Taos Resource Area, New Mexico, Bureau of Land Management (BLM). The Decisions offered to issue special recreation use permits (SRUP) for the 1995 season, subject to attached "Commercial Floatboating Stipulations" (Stipulations), and provided that Blumm's SRUP No. NM-81541 (Desert Voyagers) would be on probation for part of that season and one launch forfeited.

Additionally, Steve Miller, owner of New Wave Rafting Company (IBLA 98-117), and Kathy Miller, President of the New Mexico River Outfitters Association (the Association) (IBLA 98-118) have separately appealed from two Decisions of the District Manager, Albuquerque District, New Mexico, BLM, dated April 18 and May 9, 1995, denying their identical protests to the proposed issuance of SRUP's, subject to the same Stipulations, to New Wave and the Association's other member outfitters.

Because all of the appeals involve related aspects of permit issuance for the same river and season, we hereby consolidate the five appeals for decision by the Board.

We first address the appeals of O'Neil and Cox. In his Notice of Appeal, O'Neil objects to section C.2. of the Stipulations, which requires that he obtain workers' compensation insurance for his employees and subcontractors. He states that he had been informed by a state employee that he would not be required to obtain such insurance if his contractors agreed to indemnify and hold him harmless for any and all liability arising from the performance of their contract with him. However, O'Neil provides no evidence showing that the state employee's information is correct. Rather, he simply states: "Please accept stipulation (C2 of the 1995 Commercial Boating Stipulation) under appeal so we can clear this issue up." O'Neil has failed to affirmatively offer any reasons, with supporting argument and/or evidence, for concluding that BLM erred in imposing the stipulation requiring that he obtain such insurance.

Similarly, Cox, in his Notice of Appeal, objects only to the limitation on the number of launches he is permitted in the Bosque segment of the Lower Gorge section of the river. However, he states only that the "decision or finding of fact is erroneous." Thus, Cox has failed to affirmatively offer any reasons, with supporting argument and/or evidence, for concluding that BLM erred in limiting the number of his launches in the Bosque segment.

[1] We have long held that the failure to file an adequate statement of reasons (SOR) for an appeal is properly treated in the same manner as a failure to file any SOR would be under 43 C.F.R. § 4.412(c). The appeal will be dismissed when, in addition, no extension of time has been sought or any explanation for the failure provided. Burton A. McGregor, 119 IBLA 95, 98 (1991).

Neither O'Neil nor Cox has filed an adequate SOR. Their notices of appeal cannot be considered adequate SOR's, and they have filed nothing else with the Board. Furthermore, the time for filing an SOR, under 43 C.F.R. § 4.412(a), has long since passed. In these circumstances, we conclude that the appeals by O'Neil and Cox from the Acting Area Manager's March 1995 Decisions must be dismissed.

We next examine the merits of the appeals filed by Miller and the Association. In identical SOR's, Appellants argue that BLM's decision to limit commercial boating use during the 1995 season was taken without affording permittees adequate advance notice and an opportunity to comment. They point to the fact that BLM verbally notified permittees of an initial February 1, 1995, meeting, at the end of January 1995, and neglected to inform some permittees that it would specifically address launch restrictions. However, whatever deficiencies there were in BLM's notification to permittees prior to the initial February 1, 1995, meeting, the record shows that they had an adequate opportunity to submit comments to BLM after that date. The Association filed its counterproposal on February 5, 1995, and it was subsequently discussed at the February 8 and 22, 1995, meetings. Further, all the permittees had until BLM issued its March 8, 1995, Decisions and during the protest/appeal period thereafter to submit their comments/objections.

The Association and Miller also contend that BLM's decision to limit commercial boating use during the 1995 season was arbitrary and capricious since it was not supported by any definitive evidence in the record. They point to BLM's cover letter to the 1995 Stipulations wherein BLM cited criteria which justify imposing limitations outside of the planning process and assert that BLM has failed to show that any of the criteria exist. In its April 18 and May 9 denials of their identical protests, BLM concluded that a sufficient number of the above criteria had been met to justify its restrictions. The BLM identified those criteria as user conflicts exist, resources are at risk, serious enforcement/compliance/safety problems exist, and conflicts with adjacent land owners exist. While we note that the record does not contain extensive evidence in support of any of these concerns, it does present the considered opinion of BLM's experts, and the Association and Miller have provided no evidence that these concerns are not warranted.

Thus, we conclude that BLM's decision to impose the launch restrictions pursuant to its discretionary authority, under section 302(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1732(b) (1994), and its implementing regulations (43 C.F.R. Subpart 8372), was appropriate. See Patrick G. Blumm D/B/A RGRT, 121 IBLA 169, 171-73 (1991). We also

conclude that the District Manager, in his April 18 and May 9, 1995, Decisions, properly denied the Association's and Miller's protests to BLM's proposed issuance of SRUP's, subject to the Stipulations, to New Wave and the Association's other member outfitters.

We now address the merits of Blumm's appeals from three March 1995 Decisions of the Acting Area Manager. Two of the Decisions offered to issue SRUP's, subject to the attached Stipulations, to Blumm, in connection with both of his operations. By Order dated September 28, 1995, we denied Blumm's requests to stay the effect of the three Decisions and dismissed his appeal of launch windows as moot.

Blumm objects to BLM's requirement, set forth in sections C.2. and C.3. of the Stipulations, mandating that he obtain workers' compensation insurance covering participants, employees, and contracted personnel. He argues that this is directly contrary to a 1992 ruling by the State of New Mexico that specifically exempted his workers and thus oversteps BLM's authority. In addition, he fears that the requirement will have a far-reaching impact, requiring that he obtain insurance covering contracted local sales people, accountants, lawyers, and out-of-state booking agents. Blumm further asserts that this new and costly requirement is contrary to the longstanding practice in the Taos and other BLM resource areas. Finally, he argues that BLM improperly imposed it without sufficient advance notice.

[2] Section C.2. of the Stipulations states that the permittee "must provide workers' compensation insurance for all employees and subcontracted labor." (Stipulations at 5.) The permittee must also establish that he has done so by submitting to BLM a certificate which "names the United States as additionally insured (liability only), * * * states that the policy is in force, and * * * states that the insurer will give BLM thirty (30) days notice prior to cancellation or modification of such insurance." Id. Section C.3. further states: "The policy will cover all * * * employees and contracted personnel. Any services that are contracted for as an approved part of the permitted activity on BLM lands and waters must also be covered by the policy." Id.

When the Acting Area Manager issued his March 1995 Decisions offering to issue SRUP's to Blumm, BLM recognized that sections C.2. and C.3. represented a marked departure from past practice:

> The permit stipulations have been revised * * *. The most significant change[] concern[s] a requirement that all outfitters provide a certificate indicating they and their staff are covered by workers' compensation insurance * * *.
>
> One of our existing permit stipulations requires that all Federal, State and local laws applicable to your business are complied with. Recent court cases as well as discussions with the New Mexico Workers' Compensation Administration [(NMWCA)] has made us aware of potential liability of the BLM if a permittee

> or their staff suffer an on-job injury, and no effort was made by the agency to assure that proper coverage was provided to the injured employee. We have therefore decided to require a certificate from your insurance carrier which shows you have coverage for workers' compensation.

(Blumm Decision at 2.)

The Acting Area Manager also provided in his March 1995 Decisions that, so long as he is permitted by State law, an employer, like Blumm, may obtain information from the NMWCA regarding whether he is exempt from the requirement to obtain workers' compensation insurance. In these circumstances, he would, of course, not be required by section C.2. of the Stipulations to submit a certificate, which afforded liability coverage to the United States, since he would not be required to obtain such insurance at all. There is no evidence that Blumm ever inquired of the NMWCA. Nor does he provide any evidence that he is actually exempt from the State requirement. He refers to a 1992 ruling by the State which purported to specifically exempt his workers, but provides no copy of that decision. See Reply to Agency Response at 2. Thus, BLM was correct in requiring submission of the specified certificate as a condition of issuance of the SRUP.

We note that there is no evidence that BLM provided Blumm or the other permittees with advance notice of this change in the SRUP requirements. However, we do not find that such notice was required. Blumm, as well as other permittees, was already required by State law, unless exempt, to obtain workers' compensation insurance and then to ensure that his carrier had filed a certificate with the NMWCA showing that he had such insurance. See NMWCA, Booklet A3, Workers' Compensation Insurance Coverage, The Workers' Compensation Handbook for New Mexico (1994), at 1. Thus, no advance notice was required to obtain such insurance and file a certificate with the NMWCA, or to file with BLM and identify the United States as a named insured in the certificate.

The third Decision provided that Desert Voyagers' SRUP No. NM-81541 would be on probation for part of the 1995 season and one launch would be forfeited because Blumm had interfered with the lawful use of another resource user, a fisherman, on June 1, 1994, and had conducted an unauthorized boating trip on June 18, 1994. The Acting Area Manager also stated that, as an additional penalty for the unauthorized trip, Blumm would forfeit his June 24, 1995, launch during the next runnable season.

[3] As a holder of a SRUP issued on April 21, 1994, Blumm was required to comply with the stipulations incorporated into his permit. 43 C.F.R. § 8372.0-7(a); see Carrol White, 132 IBLA 141, 150 (1995). Normally, we will affirm a BLM decision penalizing a permittee for failure to abide by a stipulation where the violation is demonstrated by a preponderance of the evidence and the penalty chosen is not arbitrary, capricious, or based upon a mistake of fact or law. See Dvorak Expeditions, 127 IBLA 145, 151 (1993).

Section A.7. of the 1994 Stipulations provided: "The Special Recreation Use Permit does not create an exclusive right of use of the area by the permittee. The permittee shall not interfere with other valid uses of the Federal land by other users." The record clearly supports BLM's finding that Blumm, through his agent, adversely affected the lawful use of the river resource by another user. However, due to the extenuating circumstances of this case, we do not conclude that Blumm should be penalized.

In his SOR, Blumm describes those circumstances as follows:

> Desert Voyagers was involved in a rare safety rescue of a flipped raft. In order to facilitate a swift and successful rescue the guide chose to eddy out at a place in the river where the BLM alleges a fisherman was. BLM claims we therefore interfered with his lawful use of the resource. This spot was selected by our guides because it offered the fastest and safest place to check participants for injuries (there were none) and reestablish the running order and rebuild a safe tour on a very rapid segment of river.

(SOR at 2.) Blumm's description of this event is not contradicted by BLM, and is supported by the statement of Victor Apodaca, the fisherman at the scene, who observed an empty raft, heard the guide say he was going upstream to look for missing people, and was told by a passenger that a raft flipped and nine people were missing. See Incident/Investigative Record dated June 3, 1994. Given the emergency conditions surrounding this incident, we find that the guide's actions were appropriate and that the resulting interference with the other resource user was justified. Accordingly, we reverse that part of BLM's Decision imposing penalties on Blumm for interfering with the valid use of another resource user.

As to the charge of conducting an unauthorized trip on the river, section G.b.(3) of the 1994 Stipulations provided that the Lower Box segment of the river was restricted to "[e]ight commercial launches per day, with assigned launch times." It is undisputed that the June 18, 1994, trip occurred. The record contains a carbon copy of a Rio Grande Notification of Proposed River Trip and Affidavit of Use (Affidavit of Use) for June 18, 1994, signed by a BLM employee on a line for the "Signature of Approving Officer." In its July 13, 1994, letter to Blumm, BLM stated that "[a]fter reviewing our files, we have found that this trip was unauthorized and all eight launches were used by other outfitters. We did not have any vacant launches available on the launch calendar for June 18th."

Blumm's position is that if his launch was unauthorized, he should have been told, and, if told, he would not have launched. By signing and allowing the launch to proceed, Blumm contends, BLM authorized it. On the other hand, BLM contends that Blumm's launch on June 18, 1994, was unauthorized and that the BLM employee's signature did not constitute approval of the trip. The BLM states: "Appellant knows the procedure for obtaining launch approvals. Normally, Appellant follows that procedure. In the instance in question Appellant did not follow the normal procedure * * *."

(Agency Response at 7.) The BLM's position is that the role of the BLM official at the launch site is to record the fact that a launch has taken place and that this monitoring process "has nothing at all to do with the entirely separate process of authorizing one or more commercial launches." Id.

The BLM states that Appellant knows the procedure for obtaining launch approvals, but the record does not disclose what the launch authorization procedure is. As a general rule, an administrative decision is properly set aside if it is not supported by a case record providing this Board the information necessary for an objective, independent review of the basis for the decision. Shell Offshore, Inc., 113 IBLA 226, 233 (1990). See also Kanawha & Hawking Coal and Coke Co., 112 IBLA 365, 368 (1990), and cases cited. Accordingly, we must set aside BLM's Decision requiring Blumm to forfeit one future trip.

To the extent not explicitly or implicitly addressed in this Decision, all other errors of fact or law asserted by any of the Appellants have been rejected as immaterial or inconsistent with the facts or law. We find no material issue of fact that requires referring this matter for hearing.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, appeals IBLA 95-487 and IBLA 95-488 are dismissed; the Decisions appealed in IBLA 98-117 and IBLA 98-118 are affirmed; the Decisions appealed in IBLA 95-336 are affirmed in part, reversed in part, and set aside in part.

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John H. Kelly
Administrative Judge

I concur:

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James P. Terry
Administrative Judge